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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JACK HARDEN, Defendant and Appellant.	2d Crim. No. B232545 (Super. Ct. No. BA377891) (Los Angeles County)

Jack Harden appeals his conviction, by jury, of petty theft with three prior convictions. (Pen. Code, § 666.)[1] The trial court sentenced him, as a second strike offender, to a term of five years in state prison. He contends the trial court erred when it failed to instruct the jury, sua sponte, on the affirmative defenses of claim of right and mistake of fact. We affirm.

Facts

In November 2010, a hotel located at the corner of Olympic Boulevard and Bonnie Brae Street in Los Angeles was replacing the television sets in its guest rooms. Staff put some of the television sets in a banquet room. About six were stacked outside, uncovered, along an exterior wall, next to some trash cans. A ladder, sledgehammer and

[1] All statutory references are to the Penal Code unless otherwise stated.

power saw were also located nearby. An eight-foot tall wrought iron fence runs around the perimeter of the hotel. The television sets and trash cans were inside the fence.

At about 3:00 a.m., a desk clerk notified the security guard that the hotel's security cameras showed someone walking around the back of the hotel, inside the fence. The security guard soon found appellant standing inside the fence with a television at his feet and a ladder propped up against the fence. There was a second television about five feet away. The security guard handcuffed appellant and took him to the guard's work station inside the hotel's parking lot. They were soon met by the hotel's assistant manager. The assistant manager reviewed the hotel's security camera footage. This showed appellant walk into view, look through a trash can and then walk out of view, toward the back of the hotel. Appellant is shown returning into view a few minutes later, carrying a television set. He puts the television set down, walks back out of view, and then returns with another. Appellant puts the second television down, sets a ladder against the fence and then stops. At this point, the security guard appears.

After the assistant manager watched the security footage, he returned to talk with the security guard. Appellant begged the manager not to have him arrested. According to the manager, appellant said: "I am sorry. I was being stupid. I will never do it again. Please let me go. I will never do it again. I was being stupid." The assistant manager asked one of the other employees to call the police. They arrived about an hour after appellant was first discovered by the security guard.

Appellant testified that he is a recycler who earns money by scavenging for recyclable materials in dumpsters and trash cans. He was walking down the alley with a shopping cart, looking for recyclables, when he saw the trash cans. He jumped the fence to sort through the cans. After jumping the fence, appellant saw the television sets stacked next to the wall. He intended to carry the sets up the ladder and toss them over the fence. Once the ladder was in place, however, he realized the plan wouldn't work. The security guard arrived before he could come up with another plan. Appellant testified that he thought the television sets had been abandoned because they were old and they were stacked outside, uncovered, near the trash cans.

Discussion

Appellant contends the trial court erred when it failed to instruct the jury sua sponte on the affirmative defenses of claim of right and mistake of fact. Respondent contends there is no sua sponte duty to instruct on claim of right and mistake of fact, because these legal theories negate an essential element of the offense of theft, and are not affirmative defenses. Respondent further contends there is no substantial evidence to support either theory and that any failure to instruct on these theories was harmless.

The trial court in a criminal case has a duty, even in the absence of a request, to instruct the jury on the general principles of law relevant to the issues raised by the evidence. This includes a duty to instruct on defenses and on the relationship of the defenses to the elements of the charged offense. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, disapproved on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149.) "However, in the case of defenses, ' a sua sponte instructional duty arises "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case." ' " (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424, quoting *People v. Breverman, supra,* 19 Cal.4th at p. 157.)

The duty to instruct sua sponte is limited to those " 'general principles which are necessary for the jury's understanding of the case. [The trial court] need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.' [Citations.] Alternatively expressed, '[i]f an instruction relates "particular facts to the elements of the offense charged," it is a pinpoint instruction and the court does not have a sua sponte duty to instruct.' (*People v. Middleton* [(1997)] 52 Cal.App.4th [19,] 30.)" (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489.)

"An essential element of any theft crime is the specific intent to permanently deprive the owner of his or her property." (*People v. Avery* (2002) 27 Cal.4th 49, 54-55.) The defenses of mistake of fact and claim of right both negate this element of the offense. (See, e.g., *In re Jennings* (2004) 34 Cal.4th 254, 277 ["a mistake

of fact defense is not available unless the mistake disproves an element of the offense."]; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1848 [claim of right defense negates intent required for embezzlement].) As our Supreme Court has explained, " ' "[A] bona fide belief, even though mistakenly held, that one has a right or claim to the property negates felonious intent. [Citations.] A belief that the property taken belongs to the taker [citations], or that he had a right to retake goods sold [citation] is sufficient to preclude felonious intent. Felonious intent exists only if the actor intends to take the property of another without believing in good faith that he has a right or claim to it. [Citation.]" [Citation.]' (*People v. Barnett* (1998) 17 Cal.4th 1044, 1142-1143.)" (*People v. Tufunga* (1999) 21 Cal.4th 935, 943.) The same reasoning applies where the defendant takes property under the mistaken belief that the property has been abandoned. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1426-1427; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 10-11.)

A defendant is entitled to have the jury instructed on these defenses where there is substantial evidence to support them. (*People v. Tufunga, supra,* 21 Cal.4th at p. 944; *People v. Russell, supra,* 144 Cal.App.4th at pp. 1427, 1429.) In this context, substantial evidence means "evidence sufficient for a reasonable jury to find in favor of the defendant . . . ." (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' [Citations.]" (*Id.*) The instructions need not be given "where the supporting evidence is minimal and insubstantial." (*People v. Barnett, supra,* 17 Cal.4th at p. 1045.) Any doubt concerning the sufficiency of the evidence should be resolved in favor of the accused. (*Id.*)

We need not resolve the question of whether mistake-of-fact and claim-of-right are properly classified as "defenses," creating a duty on the part of the trial court to instruct, sua sponte, in an appropriate case. (See, e.g., *People v. Russell, supra,* 144 Cal.App.4th at p. 1431.) In this case, there was no substantial evidence supporting either one. Consequently, the trial court did not err in failing to instruct on these issues.

It is undisputed that the television sets were stacked against an exterior wall of the hotel, behind the wrought iron fence that surrounded the whole building. Passersby were not able to enter the fenced-in area from the street or alleyways bordering the hotel. Appellant had to jump the fence to access the trash cans and television sets. We think the presence of the fence negates any reasonable possibility that appellant believed the televisions had been abandoned. No reasonable person could believe that property has been abandoned when it is stored inside a secured, fenced-in area. (See, e.g., *People v. Russell, supra,* 144 Cal.App.4th at p. 1425.) Similarly, the claim of right defense is available only where the defendant takes "the property 'openly and avowedly . . . .' (Pen. Code, § 511.) If he attempts to conceal the taking, either when it occurs or after it is discovered, the defense is unavailable." (*People v. Wooten, supra,* 44 Cal.App.4th at p. 1849.) Here, appellant accessed the television sets by jumping over a secured fence in a location that was outside the range of the hotel's security cameras, rather than walking through the hotel lobby. That conduct cannot be described as "open" or "avowed." Because there was no substantial evidence supporting the mistake of fact and claim of right defenses, the trial court did not err in failing to instruct on those defenses.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Carol H. Rehm, Jr., Judge

Superior Court County of Los Angeles

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